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MEMORANDUM FOR: DDA; D/OS/DDA; OIS/DDA; C/CI/DDO; C/PCS/DDO; C/SECOM; C/ALD/OGC; C/ICAD/OGC

FROM: [redacted] STAT
Legislation Division
Office of Legislative Liaison

SUBJECT: Request for Comments: Draft Justice Views letter on H.R. 3188

1. Attached for your review and comment please find a copy of a draft views letter on H.R. 3188 from the Department of Justice to Chairman Jack Brooks of the House Government Operations Committee. Also attached is a copy of the bill. The letter has been sent to this Office by the Office of Management and Budget (OMB) in order to obtain the Agency's views. We would appreciate receiving your comments no later than the close of business, Wednesday, November 19, 1985.

2. The bill was drafted in the summer of 1985 at the height of Congressional reaction to the Walker and other espionage cases. It represents an effort to take advantage of that reaction by including in one legislative vehicle a variety of proposals which are in some way related to counterintelligence/security issues. As a result, you will see that the bill has provisions on a wide variety of subjects: Freedom of Information Act (FOIA) relief; diplomatic reciprocity; increased polygraph use by the Department of Defense (DoD); death penalty for espionage by members of the Armed Forces; and, death penalty for civilian espionage.

3. The bill itself stands little if any chance of passage in its current form. Many of the proposals contained therein have been included in other legislative vehicles which have passed or are close to passage as the Justice letter notes. Others are so controversial within the House that any action on them is unlikely. Further, the fact that the bill has been referred to four committees indicates that little action on it is likely.

4. Even though the bill is not likely to pass, it is important that the Justice letter not express views on the issues raised by the bill which are objectionable to the Agency. Accordingly, we ask that your review concentrate not on the bill itself but rather on whether or not Justice's comments are objectionable to the Agency. In this regard, your attention is directed especially to the views expressed by Justice on the polygraph issue.

5. Your cooperation is appreciated.

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Attachments:
as stated

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1 - D/OLL "
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1 - Leg/Sub - Counterintelligence/Security
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LEG/OLL jb (5 November 1985) STAT

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman, Committee on
Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

You requested the views of the Department of Justice concerning H.R. 3188, a bill to strengthen the counterintelligence capabilities of the Department of Defense, to amend the Uniform Code of Military Justice to establish penalties for espionage in peacetime, to create a Presidential Commission to examine the Freedom of Information Act, and to provide increased penalties for espionage. The Department of Justice is opposed to the enactment of Sections 2, 3, and 7 of this bill; is opposed to the enactment of Section 4 unless it is modified to address concerns addressed herein; and supports Sections 5 and 6 in principle but endorses alternative legislative proposals that address the concerns raised by these Sections.

Section 2 of the bill would require the President to appoint a Commission to examine the impact of the Freedom of Information Act (FOIA) on the counterintelligence capabilities of the United States and to make such other findings as the Commission deems important. We believe creation of such a commission is inadvisable.

The effect of the FOIA on the counterintelligence and law enforcement capabilities of the United States has been studied numerous times within the Executive Branch and in testimony before committees of Congress. A Presidential commission would simply duplicate these prior efforts. Further, the necessity and objectives of such a study are unclear, particularly since the security of counterintelligence investigations and programs appears to be adequately protected under Executive Order 12356, "National Security Information," and exemption (b)(1) of the FOIA.

Section 3 of H.R. 3188 would mandate the President to limit the number of diplomatic personnel in the United States from any particular foreign government to an amount equal to the number of United States diplomatic personnel serving in

that foreign country. Enactment of this provision would interfere with the President's ability to conduct the nation's foreign policy by attempting to resolve an issue that should be decided by the President in the exercise of his constitutional duty to represent the nation in international affairs. In addition, the Department of Justice believes that provisions such as this that, unlike the Senate-passed version of H.R. 2068, contain no Presidential waiver provision, raise substantial constitutional issues by their mandatory requirement for numerical equality. The President, not Congress, is the nation's spokesman in foreign affairs. See Haig v. Agee, 453 U.S. 280, 291-92 (1981); Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1943); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

Further, the concerns addressed in Section 3 have already been addressed in more detail in the State Department Authorization Act, which was signed by the President on August 16, 1985. Section 813 of that Act states that the number of Soviet nationals serving as diplomatic or consular personnel in the United States should be substantially equivalent to the number of Americans serving in the same capacity in the Soviet Union. The Secretary of State and the Attorney General are required, within six months, to submit to the Intelligence Committees, the Senate Foreign Relations Committee, and the House Foreign Affairs Committee plans to achieve the goal of equivalency and reciprocity. The Conference Report notes that substantial equivalency means plus or minus five percent, and does not include United Nations mission personnel.

Section 4 of this bill requires the Department of Defense to conduct random polygraph examinations to assist in determining eligibility for access to classified information. These examinations would be limited to counterintelligence-scope questions, and refusal to submit to a polygraph examination could expose an employee to denial or revocation of a security clearance. We believe that this provision should not be enacted unless it is amended to address the following concerns.

First, although Section 4 provides that the results of the polygraph shall not be used as the sole basis for denying access to classified information, it fails to address the weight to be given to adverse polygraph results in a security clearance determination. We believe that a simple provision that required the Secretary of Defense to issue regulations which provide for utilization of a limited polygraph examination, where appropriate, as a condition of access to classified information, would meet the objectives of the bill and would permit the resolution of problems such as those outlined above.

Second, Section 4 fails to specify the circumstances under which the results of that polygraph examination may be disseminated, or to provide safeguards with respect to unreliable polygraph results.

Third, confessions obtained during polygraph examinations of persons who are required to submit to the examinations as a condition of continued employment may be inadmissible against them in criminal proceedings because the Fifth Amendment guarantees freedom from compelled self-incrimination. Thus, in order to preserve any information obtained during a polygraph examination for possible use in a future criminal proceeding, employees must be informed prior to the examination that they are entitled to invoke their Fifth Amendment right not to answer a particular question, or to ask that a particular question be rephrased.

Fourth, subsection (b) restricts polygraph examinations to "counterintelligence-scope" questions concerning an employee's intention to leak classified information, to violate U.S. espionage laws, or to engage in terrorism, and expressly prohibits the use of life-style questions. We believe the total prohibition of life-style questions is overly restrictive and could, in some instances, prohibit inquiry into matters of legitimate counterintelligence concern.

Fifth, the bill includes no procedures for ensuring, to the extent possible, the accuracy of examination results. The presence of false adverse examination results in an employee's personnel file could cause unwarranted damage to the employee's career. These issues should be addressed if a viable polygraph program is to be established by law.

Section 5 of the bill would amend the Uniform Code of Military Justice to provide that the commission of espionage in time of peace by a member of the armed forces of the United States is punishable by death or by imprisonment for any term of years or for life. If, however, the foreign government involved is the Soviet Union or any other communist country (as publicly proclaimed by the President), death or life imprisonment would be mandatory upon conviction.

The Department of Defense Appropriation Authorization Bill for FY-86, S. 1160, as passed by the Senate, contains a provision that would permit military courts to impose the death penalty for espionage offenses committed during time of peace. We support that provision and believe that, if enacted, it would meet the concerns addressed in Section 5.

Sections 6 and 7 would amend 18 U.S.C. § 794, the federal espionage statute, to provide for the imposition of the death penalty for passing classified information to a Communist country or to an enemy of the United States. The Department of Justice strongly supports the concept of legislation to permit the imposition of the death penalty for certain types of espionage. We do not, however, support Sections 6 and 7.

Initially, we strongly prefer that the death penalty for espionage be included as part of a broader bill, such as H.R. 343, which would provide constitutional procedures for imposing capital punishment not only for espionage but also for certain other especially heinous federal crimes such as Presidential assassination which can do as much damage as espionage to the national interest. Moreover, we believe the death penalty should be generally available as a punishment for first degree murder whenever there is federal jurisdiction.

In considering any death penalty provision, it should be kept firmly in mind that the Supreme Court has held that capital punishment for certain offenses, like espionage, is not unconstitutional provided it is imposed under procedures and criteria which guard against the unfettered discretion which the Court had condemned in Furman v. Georgia, 408 U.S. 232 (1972). 1/ In our view, the best way to reestablish constitutional procedures for the imposition of the death penalty in the federal system is to amend the federal criminal code to provide for a special post-conviction sentencing hearing in cases where the death penalty is authorized and in which the prosecution has notified the defendant in advance of trial that it will seek such a punishment. At such a hearing, evidence of aggravating and mitigating factors would be introduced, the finder of fact -- usually the jury -- would determine the existence or lack thereof of such factors, and would weigh whether any aggravating factors found sufficiently outweighed any mitigating factor found to justify the imposition of a sentence of death. H.R. 343, which we generally support, provides for this type of hearing.

By contrast, Section 6 of H.R. 3188 would allow the death penalty for violations of subsection 794(a) -- peacetime espionage -- if it is found beyond a reasonable doubt that the

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1/ Particularly notable in the post-Furman cases were five decisions handed down on the same day in 1976 -- Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325.

foreign government involved is a Communist country and the information transmitted is classified. It would also allow the death penalty for violations of 794(b) -- wartime espionage -- if the foreign government involved is a Communist country or an enemy of the United States and the information transmitted is classified.

While it is permissible for the aggravating factors necessary to justify the imposition of capital punishment to be included in the statute defining the offense, rather than as factors to be proven at a sentencing hearing, see Jurek v. Texas, 428 U.S. 262, 270 (1976), it is unclear whether the aggravating factors set forth in Section 6, presumably to be established through a special finding made in conjunction with a guilty verdict, are sufficiently narrow to pass constitutional muster under Jurek. No consideration is given to the nature of the information or the potential damage caused by its disclosure as is done by H.R. 343. A clearer delimitation of appropriate mitigating and aggravating factors is necessary to render the death penalty provision clearly constitutional.

The bill also contains significant problems in that there are no provisions for a hearing or other procedure to consider possible mitigating factors and to weigh them against the aggravating factors. In sum, there are a number of problems with the death penalty provisions in Section 6, which are avoided in H.R. 343, a bill drafted generally to reflect the requirements the Supreme Court has held necessary for the imposition of the death penalty.

Section 7 of the bill would amend 18 U.S.C. § 794(a) to provide for a mandatory sentence of life imprisonment for civilians convicted of peacetime espionage on behalf of a Communist country in cases in which the death penalty was not imposed. Section 7 would also amend subsection 794(a) to provide for a mandatory life sentence for persons convicted of wartime espionage in cases in which the death penalty was not imposed. Persons sentenced to life imprisonment under either the revised 794(a) or (b) could not receive a probationary or suspended sentence and would not be eligible for parole. We believe that the provisions of this section are not in the best interest of the nation because they would lessen the probability that espionage defendants would plead guilty and waive their rights to a public trial. Espionage trials are troublesome because they sometimes require the Government to publicly disclose additional sensitive national defense information, beyond that already disclosed by the defendant, in order to obtain a conviction.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

99TH CONGRESS
1ST SESSION

H. R. 3188

To strengthen the counterintelligence capabilities of the Department of Defense, to amend the Uniform Code of Military Justice to establish penalties for espionage in peacetime, to create a Presidential Commission to study the effectiveness of the changes made in this legislation, to provide increased penalties for espionage, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1985

Mr. MCDADE introduced the following bill; which was referred jointly to the Committees on Armed Services, the Judiciary, Government Operations, and Foreign Affairs

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A BILL

To strengthen the counterintelligence capabilities of the Department of Defense, to amend the Uniform Code of Military Justice to establish penalties for espionage in peacetime, to create a Presidential Commission to study the effectiveness of the changes made in this legislation, to provide increased penalties for espionage, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "National Security Reform Act of 1985".